No. 89-909

In the Supreme Court of the United States

OCTOBER TERM, 1989

SUZAN E. TAYLOR, d/b/a EXPLORATION SERVICES,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 91 prohibits a state judgment creditor from filing an abstract of judgment against the property of a national bank prior to the exhaustion of appellate remedies.

2. Whether the United States has standing to bring this action to enjoin a violation of the national banking laws on behalf of the Comptroller of the Currency, who is charged with the execution of those laws.

3. Whether the court of appeals properly upheld a preliminary injunction under 12 U.S.C. 91 on the basis that the statute necessarily required injunctive relief as a remedy for a violation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 881 F.2d 207. The orders of the district court (Pet. App. B1-B10, F1-F6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1989. A petition for rehearing was denied on September 26, 1989. Pet. App. H1-H2. The petition for a writ of certiorari was filed on December 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 27, 1989, petitioner obtained a $9.6 million judgment against MBank Houston N.A. (MBank), in a Texas state district court. MBank then moved for an order prohibiting petitioner from filing an abstract of the judgment while MBank prosecuted an appeal. The state court denied that motion. On March 1, 1989, petitioner filed an abstract of judgment with the Clerk of Harris County, Texas. Under Texas law, the recorded abstract of judgment created a lien on all of MBank's real property located in Harris County, Texas. Pet. App. A2.

On March 1, 1989, the United States, on behalf of the Office of the Comptroller of the Currency (OCC), filed this action for declaratory and injunctive relief under 12 U.S.C. 91, which provides in relevant part that "no attachment, injunction, or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." The district court granted the government's motion for a temporary restraining order prohibiting petitioner from filing an abstract of judgment, but petitioner had succeeded in filing such an abstract nine minutes before the order was signed. Pet. App. A2, E1-E3.

On March 21, 1989, the district court granted the government's motion for a preliminary injunction ordering petitioner to withdraw the abstract of judgment previously filed against MBank. The district court explained that 12 U.S.C. 91 was enacted to prevent a state judgment creditor from obtaining a preference over other creditors of a national bank prior to final judgment. Based on its finding that petitioner had achieved such a preference by filing her abstract of judgment, the court held that an injunction requiring petitioner to withdraw the abstract of judgment was necessary to effectuate the purposes of the statute. Pet. App. B4, B7-B9.

On March 28, 1989, the Comptroller declared MBank insolvent and appointed the FDIC its receiver. The FDIC as receiver conveyed all of MBank's real estate in Harris County, Texas, to Federal Deposit Bridge Bank, N.A. (Bridge Bank), which has since been renamed Bank One, Texas, N.A. Upon the motion of the FDIC as receiver and Bridge Bank, the district court on April 18, 1989, ordered petitioner to release unconditionally her abstract of judgment by April 24, 1989, or be held in contempt. Pet. App. A3 n.1, F1-F6.[1]

2. Petitioner appealed both the preliminary injunction and the order requiring release of her abstract of judgment. Pet. App. A3. The court of appeals affirmed both orders, holding that 12 U.S.C. 91 prohibits a state judgment creditor from filing a Texas "abstract of judgment" against the property of a national bank prior to the completion of the appellate process. Pet. App. A5-A6.

The court of appeals initially determined that the United States had standing to bring this action. The court noted that the OCC has a supervisory and regulatory interest in enforcing the national banking laws, including 12 U.S.C. 91. That interest "provides sufficient standing for the United States to bring this action." Pet. App. A3 (citing *United States* v. *Lemaire*, 826 F.2d 387, 388 & n.1 (5th Cir. 1987), cert. denied, 485 U.S. 960 (1988)).

Next, the court of appeals held that although 12 U.S.C. 91 does not refer by name to abstracts of judgment, under Texas law an abstract of judgment is the functional equivalent of an "attachment" or an "injunction," both of which are specifically prohibited by Section 91. The court

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[1] The court declined to consolidate the trial on the merits with the hearing on the preliminary injunction motion, because petitioner claimed that the United States had "conspir[ed]" with MBank to prevent her from filing her abstract of judgment, and the court deemed it "inequitable" to consider that claim on the government's motion for preliminary relief. Pet. App. B3, B5, B9.

explained that Section 91 must be read to effectuate the statutory purpose of preventing state judgment creditors of a national bank from obtaining preferential treatment prior to final judgment. Petitioner's abstract of judgment would allow her to obtain such preferential treatment; hence, ordering her to withdraw it fulfills the policies underlying 12 U.S.C. 91. Pet. App. A5-A6.

Finally, the court rejected petitioner's argument that the district court was required to consider competing assertions of harm and the public interest before granting a preliminary injunction. The court reasoned that where a statutory violation is established and the statute "by necessary and inescapable inference requires injunctive relief," the violation may be enjoined without proof of the injury and public interest factors generally required for an injunction. Pet. App. A6. Applying those principles, the court concluded that Section 91's policy of preventing state judgment creditors from obtaining preferential treatment prior to final judgment "requires injunctive relief once a statutory violation is shown." Pet. App. A7.

ARGUMENT

1. Petitioner first contends (Pet. 8-12) that the court of appeals incorrectly interpreted the nature and effect of an abstract of judgment under Texas law in holding that an abstract of judgment is equivalent to an attachment or injunction and is, therefore, prohibited by 12 U.S.C. 91. To the extent that petitioner challenges the court's interpretation of Texas law, review by this Court is not warranted, because this Court has "a settled and firm policy of deferring to the regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2739 (1988); *Frisby* v. *Schultz*, 108 S. Ct. 2495, 2500 (1988); *Virginia* v. *American Booksellers Ass'n*,

484 U.S. 383, 395 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979).

At all events, the court of appeals' decision is correct. 12 U.S.C. 91 expressly prohibits any "attachment, injunction, or execution" against a national bank prior to final judgment. This Court long ago held that prejudgment attachments against national banks violate Section 91. *Van Reed* v. *People's Nat'l Bank*, 198 U.S. 554, 558-559 (1905); *Pacific Nat'l Bank* v. *Mixter*, 124 U.S. 721, 726 (1888). In this case, the court held that an abstract of judgment is prohibited by Section 91 since, under Texas law, an abstract of judgment is identical in effect to an attachment of real property. See Pet. App. A5 (citing *Stewart* v. *Rockdale State Bank*, 52 S.W.2d 915, 916 (Tex. Civ. App. 1932), aff'd, 124 Tex. 431, 79 S.W.2d 116 (1935)).

Petitioner's argument that an "abstract of judgment" is not barred by Section 91 because that provision does not specify such a procedure by name is without merit. If accepted, that argument would open a loophole for creditors to take advantage of any state procedure that has the identical effect as an "attachment," 'injunction," or "execution," but is simply called by a different name under local law.[2] Such an interpretation would prevent the uniform applica-

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[2] As this case illustrates, that possibility is hardly academic. See also 11 *West's Legal Forms* § 15.1, at 4 (2d ed. 1984) ("It should be noted that there is considerable variation in nomenclature among the states. For example, what is called [an] attachment in one state may be referred to as [a] garnishment in another."). Compare *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 n.7 (1981) (quoting W. Shakespeare, *Romeo and Juliet*, Act II, scene 2, line 43). While an attachment is ordinarily used before judgment, it is analogous to various postjudgment remedies, such as the remedy used here. See 11 *West's Legal Forms*, *supra*, § 16.91, at 207-208 (discussing procedure of filing an abstract of judgment in order to obtain a judgment lien).

tion of Section 91 to banks located in different states—a result that Congress could not have intended. Here, an abstract of judgment under Texas law creates a judgment lien that prevents the free transfer of the judgment debtor's property. It therefore immobilizes the property in the same manner as an attachment or injunction, both of which are expressly prohibited by Section 91. Just as an attachment against a national bank violates Section 91, an equivalent procedure under state law, such as filing an abstract of judgment, also violates that statute.[3]

Petitioner relies (Pet. 11) on *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 320 (1977), for the proposition that 12 U.S.C. 91 applies only to state procedures "that accomplish a seizure of property." That reliance is misplaced. In that case, the Court held that Section 91's prohibition on prejudgment procedures applies only to actions "by creditors of the bank" and does not apply to actions seeking to "seize property belonging to others which happens to be in the hands of the bank." 432 U.S. at 323-324. In focusing on the distinction between creditors of the bank and other parties, the Court did not consider what forms of process are covered in cases where Section 91 is applicable, let alone limit Section 91's coverage to cases involving a direct, physical "seizure" of property. Indeed, if anything, the reasoning of the Court points in exactly the opposite direction.[4]

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[3] Petitioner's claim that the decision below conflicts with the district court decision in *United States* v. *Theos*, 709 F. Supp. 1007 (D. Colo. 1989), does not warrant this Court's attention. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.8, at 207-208 (6th ed. 1986).

[4] The Court, in noting that Congress intended in Section 91 "to prevent state judicial action, prior to final judgment, which would have the effect of seizing the bank's property," observed that before Section 91 was passed, it was "not unknown" for creditors to use "injunctions

At all events, petitioner's argument that only physical "seizures" are embraced by Section 91 proves too much. If petitioner's argument were correct, Section 91 would not apply to an "attachment" of real estate under Texas law, because, as petitioner concedes (Pet. 11), the attachment of real estate in Texas does not involve physical seizure. But the plain language of Section 91 covers such "attachments," and there is nothing in the statute's language or underlying policies that would support the narrowing construction urged by petitioner.

Contrary to petitioner's argument (Pet. 10-11), the preliminary injunction in this case was not based on the view that 12 U.S.C. 91 prohibits all preferences against a national bank. Both the district court and the court of appeals correctly recognized that Section 91 prevents creditors of national banks from obtaining preferences *prior to final judgment*. Pet. App. A5, B7-B8. Petitioner's judgment, prior to the exhaustion of an appeal, was not final for purposes of Section 91. *United States* v. *Lemaire*, *supra*. Thus, Section 91's prohibition on preferences was directly applicable. The cases cited by petitioner to illustrate that Section 91 does not bar all preferences are inapposite, since none involved preferences asserted prior to final judgment. See Pet. 10-11 (citing *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559, 566-567 (1934); *Merrill* v. *National Bank*, 173 U.S. 131, 144-145 (1899); *Scott* v. *Armstrong*, 146 U.S. 499, 509-510 (1892)).

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before final judgment" against the transfer of property by banks to effect such seizures. *Third Nat'l Bank*, 432 U.S. at 323 & n.18. Although such injunctions did not involve the physical seizure of property, they still had the effect of immobilizing the bank's property by restraining its transfer – just as did the "abstract of judgment" here. Pet. App. A5 (noting that the abstract of judgment here was "similar to an injunction" because it "prohibits a national bank from freely transferring its property").

2. Petitioner next claims that the United States lacks standing to bring this action. That contention is without merit. This Court has long recognized the standing of the United States to bring actions designed to prevent interference with its powers and functions. *United States* v. *American Bell Telephone Co.*, 128 U.S. 315 (1888); *In re Debs*, 158 U.S. 564 (1895); *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191, 201-204 (1967). The OCC's valid interest in enforcing one of the banking laws intended to protect national banks clearly provides sufficient standing for the United States to bring this action. See *United States* v. *Lemaire*, 826 F.2d at 388 & n.1; *Federal Home Loan Bank Bd.* v. *Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985).

As petitioner acknowledges (Pet. 12), the OCC supervises and regulates the national banking system. If a national bank violates applicable law or persists in unsafe and unsound banking practices, the Comptroller has the authority to issue cease and desist orders, to impose civil money penalties, to remove officers and directors pursuant to statutory procedures, 12 U.S.C. 1818, or to appoint a conservator for the bank, 12 U.S.C. 203. The Comptroller also has the authority to conduct bank examinations, 12 U.S.C. 481, and to appoint a receiver when he is satisfied that a national bank is insolvent. 12 U.S.C. 191. In light of the Comptroller's broad powers to protect the national banking system, the OCC has standing to bring actions to restrain violations of the laws regulating the activities of national banks.

3. Finally, petitioner argues (Pet. 13-14) that the district court had to find irreparable injury and balance the equities before issuing a preliminary injunction in this case. This Court has repeatedly stated that when a party moves to enjoin a statutory violation and the statute by "a necessary and inescapable inference" requires injunctive relief, the

movant need not prove the injury or public interest factors generally required for an injunction. *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987); *TVA* v. *Hill*, 437 U.S. 153, 194-195 (1978); *United States* v. *City of San Francisco*, 310 U.S. 16, 30-31 (1940). Those principles are fully applicable here.

As the court of appeals explained, the purpose of 12 U.S.C. 91 is to prevent a judgment creditor from obtaining preferential treatment prior to final judgment. Pet. App. A5; see *Lemaire*, 826 F.2d at 387. Because petitioner's abstract of judgment gave her a preference over other creditors prior to final judgment, the court of appeals properly held that an injunction was the only means available to ensure compliance with Section 91. Absent an injunction, the purpose of the statute to free banks from prejudgment restraints on their property would be frustrated. Thus, the policy expressed in Section 91 "by a necessary and inescapable inference," *Amoco*, 480 U.S. at 542, warranted the issuance of the requested injunction upon the showing of a violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262 203/00741